

are additionally affected by §§ 124.109, 124.110, and 124.111, respectively.

(2) In order to remain eligible to participate in the 8(a) BD program after certification, a firm must generally remain small for its primary industry classification, as adjusted during the program. SBA may graduate a Participant prior to the expiration of its program term where the firm exceeds the size standard corresponding to its primary NAICS code, as adjusted, for three successive program years, unless the firm demonstrates that through its growth and development its primary industry is changing, pursuant to the criteria described in 13 CFR 121.107, to a related secondary NAICS code that is contained in its most recently approved business plan. The firm's business plan must contain specific targets, objectives, and goals for its continued growth and development under its new primary industry.

(b) If 8(a) BD program officials determine that a concern may not qualify as small, they may deny an application for 8(a) BD program admission or may request a formal size determination under part 121 of this title.

(c) A concern whose application is denied due to size by 8(a) BD program officials may request a formal size determination under part 121 of this title. A favorable determination will enable the firm to immediately submit a new 8(a) BD application without waiting one year.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8254, Feb. 11, 2011]

§ 124.103 Who is socially disadvantaged?

(a) *General.* Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control.

(b) *Members of designated groups.* (1) There is a rebuttable presumption that the following individuals are socially disadvantaged: Black Americans; Hispanic Americans; Native Americans (Alaska Natives, Native Hawaiians, or enrolled members of a Federally or

State recognized Indian Tribe); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal); and members of other groups designated from time to time by SBA according to procedures set forth at paragraph (d) of this section. Being born in a country does not, by itself, suffice to make the birth country an individual's country of origin for purposes of being included within a designated group.

(2) An individual must demonstrate that he or she has held himself or herself out, and is currently identified by others, as a member of a designated group if SBA requires it.

(3) The presumption of social disadvantage may be overcome with credible evidence to the contrary. Individuals possessing or knowing of such evidence should submit the information in writing to the Associate Administrator for Business Development (AA/BD) for consideration.

(c) *Individuals not members of designated groups.* (1) An individual who is not a member of one of the groups presumed to be socially disadvantaged in paragraph (b)(1) of this section must establish individual social disadvantage by a preponderance of the evidence. Such individual should present corroborating evidence to support his or her claim(s) of social disadvantage where readily available.

(2) Evidence of individual social disadvantage must include the following elements:

(i) At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of

American society, or other similar causes not common to individuals who are not socially disadvantaged;

(ii) The individual's social disadvantage must be rooted in treatment which he or she has experienced in American society, not in other countries;

(iii) The individual's social disadvantage must be chronic and substantial, not fleeting or insignificant; and

(iv) The individual's social disadvantage must have negatively impacted on his or her entry into or advancement in the business world. SBA will consider any relevant evidence in assessing this element, including experiences relating to education, employment and business history (including experiences relating to both the applicant firm and any other previous firm owned and/or controlled by the individual), where applicable.

(A) *Education.* SBA considers such factors as denial of equal access to institutions of higher education, exclusion from social and professional association with students or teachers, denial of educational honors rightfully earned, and social patterns or pressures which discouraged the individual from pursuing a professional or business education.

(B) *Employment.* SBA considers such factors as unequal treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment; retaliatory or discriminatory behavior by an employer; and social patterns or pressures which have channeled the individual into nonprofessional or non-business fields.

(C) *Business history.* SBA considers such factors as unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, and exclusion from business or professional organizations.

(3) An individual claiming social disadvantage must present facts and evidence that by themselves establish that the individual has suffered social disadvantage that has negatively im-

pacted his or her entry into or advancement in the business world.

(i) Each instance of alleged discriminatory conduct must be accompanied by a negative impact on the individual's entry into or advancement in the business world in order for it to constitute an instance of social disadvantage.

(ii) SBA may disregard a claim of social disadvantage where a legitimate alternative ground for an adverse employment action or other perceived adverse action exists and the individual has not presented evidence that would render his/her claim any more likely than the alternative ground.

Example 1 to paragraph (c)(3)(ii). A woman who is not a member of a designated group attempts to establish her individual social disadvantage based on gender. She certifies that while working for company X, she received less compensation than her male counterpart. Without additional facts, that claim is insufficient to establish an incident of gender bias that could lead to a finding of social disadvantage. Without additional facts, it is no more likely that the individual claiming disadvantage was paid less than her male counterpart because he had superior qualifications or because he had greater responsibilities in his employment position. She must identify her qualifications (education, experience, years of employment, supervisory functions) as being equal or superior to that of her male counterpart in order for SBA to consider that particular incident may be the result of discriminatory conduct.

Example 2 to paragraph (c)(3)(ii). A woman who is not a member of a designated group attempts to establish her individual social disadvantage based on gender. She certifies that while working for company Y, she was not permitted to attend a professional development conference, even though male employees were allowed to attend similar conferences in the past. Without additional facts, that claim is insufficient to establish an incident of gender bias that could lead to a finding of social disadvantage. It is no more likely that she was not permitted to attend the conference based on gender bias than based on non-discriminatory reasons. She must identify that she was in the same professional position and level as the male employees who were permitted to attend similar conferences in the past, and she must identify that funding for training or professional development was available at the time she requested to attend the conference.

(iii) SBA may disregard a claim of social disadvantage where an individual presents evidence of discriminatory

conduct, but fails to connect the discriminatory conduct to consequences that negatively impact his or her entry into or advancement in the business world.

Example to paragraph (c)(3)(iii). A woman who is not a member of a designated group attempts to establish her individual social disadvantage based on gender. She provides instances where one or more male business clients utter derogatory statements about her because she is a woman. After each instance, however, she acknowledges that the clients gave her contracts or otherwise continued to do business with her. Despite suffering discriminatory conduct, this individual has not established social disadvantage because the discriminatory conduct did not have an adverse effect on her business.

(4) SBA may request an applicant to provide additional facts to support his or her claim of social disadvantage to substantiate that a negative outcome was based on discriminatory conduct instead of one or more legitimate non-discriminatory reasons.

(5) SBA will discount or disbelieve statements made by an individual seeking to establish his or her individual social disadvantage where such statements are inconsistent with other evidence contained in the record.

(6) In determining whether an individual claiming social disadvantage meets the requirements set forth in this paragraph (c), SBA will determine whether:

(i) Each specific claim establishes an incident of bias or discriminatory conduct;

(ii) Each incident of bias or discriminatory conduct negatively impacted the individual's entry into or advancement in the business world; and

(iii) In the totality, the incidents of bias or discriminatory conduct that negatively impacted the individual's entry into or advancement in the business world establish chronic and substantial social disadvantage.

(d) *Socially disadvantaged group inclusion*—(1) *General.* Representatives of an identifiable group whose members believe that the group has suffered chronic racial or ethnic prejudice or cultural bias may petition SBA to be included as a presumptively socially disadvantaged group under paragraph (b)(1) of this section. Upon presentation of substantial evidence that members of the

group have been subjected to racial or ethnic prejudice or cultural bias because of their identity as group members and without regard to their individual qualities, SBA will publish a notice in the FEDERAL REGISTER that it has received and is considering such a request, and that it will consider public comments.

(2) *Standards to be applied.* In determining whether a group has made an adequate showing that it has suffered chronic racial or ethnic prejudice or cultural bias for the purposes of this section, SBA must determine that:

(i) The group has suffered prejudice, bias, or discriminatory practices;

(ii) Those conditions have resulted in economic deprivation for the group of the type which Congress has found exists for the groups named in the Small Business Act; and

(iii) Those conditions have produced impediments in the business world for members of the group over which they have no control and which are not common to small business owners generally.

(3) *Procedure.* The notice published under paragraph (d)(1) of this section will authorize a specified period for the receipt of public comments supporting or opposing the petition for socially disadvantaged group status. If appropriate, SBA may hold hearings. SBA may also conduct its own research relative to the group's petition.

(4) *Decision.* In making a final decision that a group should be considered presumptively disadvantaged, SBA must find that a preponderance of the evidence demonstrates that the group has met the standards set forth in paragraph (d)(2) of this section based on SBA's consideration of the group petition, the comments from the public, and any independent research it performs. SBA will advise the petitioners of its final decision in writing, and publish its conclusion as a notice in the FEDERAL REGISTER. If appropriate, SBA will amend paragraph (b)(1) of this section to include a new group.

[63 FR 35739, June 30, 1998, as amended at 74 FR 45753, Sept. 4, 2009; 76 FR 8254, Feb. 11, 2011; 81 FR 48579, July 25, 2016]